83-1261

Office - Supreme Court, U.S.
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MAY 22 1984
ALEXANDER L. STEVAS,
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM C. LYDDAN, Petitioner

-against-

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT IN REPLY

Respondents assert that there is "...no conflict among the circuits on the questions presented. Those questions, moreover, have little administrative importance" (Brief for the United States in Opposition, 5). Petitioner disagrees on both counts.

1. The court below, the U.S. Court of Appeals for the Second Circuit, squarely ruled

that spouses could not be considered "separated" for purposes of the Internal Revenue Code (IRC) Sections 71(a)(3) and 215 deduction for temporary alimony. By contrast, the U.S. Court of Appeals for the Eighth Circuit in Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978), squarely ruled that spouses could be considered "separated" for such purposes. As the court below said in its opinion herein: "We respectfully disagree with Sydnes' conclusion that a fact issue can be presented when the couple occupies the same residence" (Pet. App. 13). That court also noted that "...the issues on this appeal should be resolved as a matter of law..." and pointedly refrained from deciding as a factual matter whether plaintiff and his then wife were separated, to do so being unnecessary to the court's reasoning and decision (Pet. App. 10). It is nevertheless worthy of note that despite the very high "clearly erroneous" standard, the court below entertained some doubt as to

whether the parties were separated (Pet. App. 10). And the transcript of the hearing before Judge LaMacchia of the Connecticut Superior Court (Pet. App. 46-51) was submitted to the court below under Rule 201(f) of the Federal Rules of Evidence, on motion to reargue, after the court's opinion had been issued.

Several commentators have agreed that a conflict exists. For example, "Taxes on Parade" Number 54, p. 3, November 30, 1983, a publication of Commerce Clearing House, Inc., notes: "In arriving at this decision, the court (Second Circuit Court of Appeals) expressly rejected the Eighth Circuit's interpretation of the "separate and living apart" requirement contained in the regulations." (Bracket added). And the "Journal of Taxation," vol. 60 no. 2, p. 132, February, 1984, a publication of Warren, Gorham & Lamont, Inc., notes: "Thus, that court flatly disagreed with a previous decision by the Eighth Circuit in Sydnes,

577 F.2d 60 (CA-8, 1978)....With the adoption of this position by the Second Circuit, the stage may be set for a Supreme Court determination of this issue." Neither petitioner nor petitioner's counsel in any way sought the publication of these news items, having, in fact, unsuccessfully requested both lower courts to seal their opinions herein, in view of the irreparable and irremediable harm to reputations which petitioner, with all due respect, believes is without justification on or off the record. The lower court opinions left petitioner's counsel feeling as former Illinois Governor Adlai E. Stevenson averredly felt after losing the 1952 presidential election - "too old to cry but it hurt too much to laugh."

In particular, petitioner wishes to note: The Concise Statement of Facts in petitioner's brief was 2-1/2 pages long, not 30 pages, as stated by Judge Murphy (Pet. App. 30); head-of-household rates may be claimed in the case

of dependent parents although the parents do not live in the taxpayer's home (IRC Section 2(b)(1)(B)) but Form 1040 fails to provide for such a situation (Pet. App. 21, 22); petitioner's son is an attorney practicing with a large Los Angeles, California, law firm, who flew East the day before the trial and met with petitioner's counsel for all of 20 minutes for a brief chat before taking the witness stand, and his testimony (which the trial court extensively used, then rejected (Pet. App. 27, 28)) was totally unrehearsed (Pet. App. 28); and the Eighth Circuit Court of Appeals in the Sydnes case did defer to the applicable Treasury regulations (Pet. App. 42). Finally, the football game referred to at Pet. App. 31 as having been attended by the Lyddans in 1971, both sides agreed took place in October 1970, as proven by a newsmagazine introduced in evidence by respondent.

2. The above-mentioned article in the

"Journal of Taxation" goes on to note: "Moreover, spouses who have included amounts in income as alimony, even though they still shared a residence with the payor, are afforded additional authority for filing a refund claim." Thus divorcing spouses residing in the same dwelling but considering themselves separated*, whose financial planning pursuant to the Sydnes decision may have called for a deduction of temporary alimony payments by the payor and taxation to the payee, are now faced with a new complication: Can or should a payee spouse residing anywhere but in the Eighth Circuit now claim a refund under the Lyddan decision on the ground that the temporary alimony should have been taxed to the payor. If such a claim were to be filed, presumably the

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* Presumably if the spouses are seeking a divorce and one spouse has been compelled to obtain a court order requiring the other to pay temporary alimony, the spouses will consider themselves separated for matrimonial if not residential purposes.

Internal Revenue Service would allow it. On the other hand if the claim were disallowed, the payee could litigate relying on the decision below. The Internal Revenue Service could in turn assert a deficiency against the payor spouse and the payor in turn could then litigate the dispute relying on the Sydnes decision. Thus the split between the circuits could create a morass of claims and cross claims which could assume significant administrative importance. And the case at bar is the 6th (the 4th since 1981) in which courts have been called on to resolve this issue which, if not now put to rest, in all likelihood will be further litigated until finally decided by this Court. Therefore the question, even if lacking significant administrative importance, could have significant judicial importance.

3. This ambiguity in the tax law is particularly regrettable in the area of tax planning in connection with marital disputes,

an area in which Congress has striven for cut and dried rules to enable divorcing spouses to predict with certainty the tax and economic effect of proposed financial settlements. See Commissioner v. Lester, 366 U.S. 299 (1961); H.R. Rep. No. 2333, 77th Cong., 2nd Sess. 72; H.R. Rep. No. 1337, 83rd Cong., 2nd Sess. A21; Burnet v. Harmel, 287 U.S. 103 (1932). In the Lester case this Court spoke of the "...uncertainty in tax consequences that the Congress intended to and, we believe, did eliminate..." The Lester case involved support payments, but H.R. Reps. Nos. 2333 and 1337, supra, clearly indicate Congress was no less concerned with certainty in the area of temporary alimony payments (Pet. 24 and underlined matter, 23). Furthermore, the need to give a "...uniform application to a nationwide scheme of taxation", see Burnet v. Harmel, supra, p. 110, makes the "separate roofs" issue "...an important question of federal law which has

not been, but should be, settled by this Court..." See Rule 17.1(c), Rules of the Supreme Court of the United States. This rule would appear to provide an independent basis for review by this Court in addition to the conflict between the Second and Eighth Circuit Courts of Appeals.

Respondent makes the claim that petitioner's view of the law is at odds "...both with common sense and with the statutory scheme...," (Respondent's Brief, 7). This is rather harsh criticism considering that petitioner's view of the law is the view adopted by the United States Court of Appeals for the Eighth Circuit. Sydnes, supra. Similarly, respondent claims that petitioner's suggested "bright line" test to determine if spouses are separated, namely the existence of a support decree obtained in the course of matrimonial litigation, is "frivolous" (Respondent's Brief, fn. 7). Again this is a rather harsh characterization to level,

considering the same view was expressed by the United States Tax Court minority in Washington v. C.I.R., 77 T.C. 601, 607 (1981).

In fact the case for petitioner herein is not lacking in common sense and is not frivolous. Nor would it encourage collusive separations. The problem in Boyter v. Commissioner, 668 F.2d 1382 (4th Cir. 1981) involved the somewhat unusual situation present when husband and wife have roughly equal incomes and find they would owe less tax if each filed a single return than if together they filed a joint return. To enable each spouse to file a single return, a sham divorce was arranged near the end of the year followed by an equally sham marriage early the following year. In situations like the present, however, if the spouses wish to act "collusively" they need only file a joint return, which would be perfectly legal since by definition they are still married. Using joint rates, in the vast majority if

not every case less tax would be owed than if the payor were permitted to deduct temporary alimony on his or her own return, since married taxpayers filing separate returns must use the highest tax rates of any individual taxpayers, higher than either married taxpayers filing jointly, head-of-household taxpayers, or single taxpayers. Compare IRC Section 1(d) with Section 1(a), 1(b) and 1(c). And both must itemize if either does, which can deprive a spouse with few or no deductions of the benefit of the standard deduction (zero-bracket amount) IRC Section 63(e)(1)(A). In the present case, if petitioner and his wife had filed "married filing separately" returns in 1971, the year in question, and had the temporary alimony payments been deducted by petitioner and included by his wife in income (in accordance with the more favorable Sydnes rule), petitioner's Federal income tax would have been $23,228 and his wife's would have been $1,430, for a combined

tax of $24,658. Had they filed jointly, however, their total tax would have been $22,105, some $2,553 less. Thus the threat of "collusive separations" under the Sydnes rule, ostensibly feared by respondent (Respondent's Brief p. 9) is hardly a problem. Such "collusive separations" would actually increase the spouses' Federal income tax liability, in the present case by $2,553. Hopefully other assertions in respondent's brief have been more carefully considered than this one.

4. Petitioner has requested that the trial court's fact findings be measured against the "clearly erroneous" standard in the hope of rehabilitating the reputations of those concerned, but the public importance of such an inquiry is probably de minimis (But cf. U.S. v. Forness, 125 F.2d 928, 942 (2d Cir. 1942)).

However, a brief paragraph describing this relationship as found by the trial court will correct the misimpressions left by respondent's attempted description of this relationship

(Resp. Brief 2). The trial court found that in all of 1971 petitioner and his then wife ate two meals together out of a presumed total of 3 x 365 or 1,095 (PA-31). The trial court found that the Lyddans were together on three other occasions in 1971. Two events petitioner testified he attended solely because of his wife's threats (admitted by her at the trial) to kill him (See Pet. 12). The third social function was reported in an October 1970 magazine introduced by respondent. Incidentally, in Sydnes the parties had been married 25 years, whereas petitioner and his wife became involved in matrimonial litigation 5 months after marrying (PA-18, 29, 30).

On the question of the existence of a court order requiring petitioner to allow his then wife to reside in his house, the trial court's contrary finding was solely based on the absence of a formal decree (PA-32, 33). The transcript of the hearing at which petitioner was ordered by the Superior Court of Connecticut to allow his then wife

to live in his house would have been submitted at the trial had the slightest question, on direct or cross-examination, arisen regarding this order. But respondent did not question in any way the existence of this order even in respondent's post-trial memo (Pet. 10). The transcript as a whole makes unmistakable that the assertion "...they are going to live together and he has to feed both of them..." was declaratory not narrative. Otherwise what possible reason could Judge LaMacchia have had for ordering petitioner to pay the mortgage, taxes, insurance, etc., on his own house (PA-47).

Respondent claims petitioner is asking this Court to read the "separated" requirement out of the statute (Resp. Brief, 9), but this is not so at all. As petitioner interprets the statute, the word "separated" serves an important purpose. The word "separated" in §71(a)(3) IRC provides the only indication that the statute is meant to apply to marital controversies, as opposed to nonsupport

situations in which the spouses are not seeking a divorce or legal separation. As the petition makes clear (Pet. 54) it is the existence of matrimonial litigation and a judicial support decree (each readily verifiable) that in petitioner's view satisfies the requirements of the statute and provides a readily administered test. The only indication petitioner has come across of the meaning given by Congress to such terms as "living together" and "separated" is found in the Committee Reports quoted on pp. 38-39 of the petition herein, which respondents completely misconstrue (Resp. Brief 8, fn. 6). These committee reports show that the Committee on Ways and Means was expressly not concerned with whether spouses resided in the same or different homes, but whether they had or had not evidenced the intention to abandon the marital relationship. Clearly whenever one spouse or both spouses have sued for divorce or legal separation, and one spouse has obtained

a temporary alimony order, the requisite state of "separation" exists.

But the main reason why petitioner believes this Court should find that Congress used the word "separated" in §71(a)(3) IRC to imply a marital rather than a residential separation is the legislative history cited on pp. 28-29 of the petition. When husband and wife are truly separated in the marital sense clearly each spouse is spending his or her income without regard to the wants or needs of the other spouse. The House and Senate Committee reports are clearly concerned with the inequity of making the husband pay tax on a "...portion of his income (that) goes to his wife as alimony..." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 46. And when in 1954 the alimony deduction was extended to cover temporary support payments, here in issue, Congressional reports clearly stated that "no substantive change" was intended, and that the deduction was merely being extended. S.Rep. No. 1622, 83rd Cong., 2d Sess. pp.

170-171 and H.R. Rep. No. 1337, 83rd Cong., 2d Sess. A21. The legislative history of §71(a)(3) IRC, the subdivision in question, at no place uses the term "living apart," used in respondent's regulations. Treas. Reg. §1.71-1(b)(3)(i). This term is only used in the legislative history of §71(a)(2) allowing a deduction for support payments pursuant to a "written separation agreement." Assuming the Sydnes decision is wrong in concluding that spouses may be "living apart" although residing in the same house, it may well be Congress had in mind a tougher test of "separatedness" where no court order for support payments was involved. In any event, §71(a)(2) is not before the Court at this time.

Consequently it is respondent who is requesting the courts to sit as a "super-legislature" and add a requirement so that the statute would read: "If a wife is separated and lives apart from her husband..." or "If a wife is separated from her husband, and maintains her own place of abode..." This

adds another requirement for deductibility under §§71(a)(3) and 215 IRC, a requirement that might be difficult to enforce since human relationships do not always lend themselves to the neat compartmentalization assumed by the "separate roofs" test. Well-to-do spouses may already own more than one residence and IRS auditors would have to determine which spouse was living in which residence on the date of each support payment, or the last day of the taxable year, or even the entire taxable year. The residences of co-respondents or paramours may be used by one spouse or another. And as the cases cited on page 53 of petitioner's brief indicate, even spouses who maintain separate residences may continue to associate by way of conjugal visits, etc., possibly calling for some kind of a "substance over form" test(?). CF. Gregory v. Helvering, 293 U.S. 465 (1935). Clearly the existence of a support order in the context of litigation to dissolve the marriage would be an easier

test of "separatedness" to apply, as noted by Judge Sterrett in his dissent in Washington, supra.

But the true issue here is not which "bright line" test would be easier to enforce, but rather the scope of Congress' intent as expressed in §71(a)(3) IRC. Respondent may not regulate at odds with a law passed by Congress, even to simplify enforcement of the revenue laws. And if respondent's regulation means what respondent says it means, rather than what the Eighth Circuit in Sydnes says it means, respondent's regulation unlawfully disallows payor-spouses a deduction for temporary support which Congress intended them to have, and the disallowance is for the irrelevant consideration that payor and payee spouses are residing in the same dwelling. Confiscatory taxes could be imposed on a payor-spouse even if residing with a payee-spouse, and Congress' overriding and expressed concern that the person receiving, and entitled to, income should pay tax on it,

would fail to be addressed by the statute in the case of spouses residing in the same dwelling. It is in this larger sense that Lester, supra, is relevant, and the decision below "out of harmony" with it, in the pertinent spectrum between the two above-mentioned "bright lines" consisting of spouses occupying the same dwelling.

Respectfully submitted,

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May 21, 1984